Moreover, the jail term faced by a defendant under the statute upheld below could be 22½ times greater than that suffered if the statute is properly recognized as denying due process. This substantial question of due process should be resolved by this Court. *See*: *Thompson v. Louisville,* 362 U.S. 199, 203, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960). The petition should be granted to settle the issue.

II. BY UPHOLDING A STATUTORY COMMAND THAT AN UNPROVEN CHARGE TRIGGERS AN INCREASED JAIL SENTENCE FOR THOUSAND OF DUI FIRST OFFENDERS, THE SUPREME COURT OF WASHINGTON DECIDED AN IMPORTANT AND RECURRING QUESTION OF FEDERAL DUE PROCESS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The petitioner, but for the trial court's concluding that the statute in question was constitutionally deficient, would have been deprived of liberty because of an unproven criminal offense. The statute in question requires the sentencing judge to treat the defendant as having been convicted of a charge that was merely filed, but never proven. RCW 46.61.5055(12)(a)(v). Had that statute been applied to the petitioner, she would have suffered a jail sentence 22½ times longer than the trial court found to be fair and just.

The due process clause of the Fourteenth Amendment protects persons from imprisonment for crime unless the crime charged is proven beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) presents the dispositive holding under which the instant case is subsumed:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

The logic of *Winship* is clear and controlling here.

If a defendant may not be subjected to the pains of criminal conviction on proof by a lesser standard than reasonable doubt, a defendant may not be subjected to the pains of conviction on no proof at all. Yet, that is exactly what the statute in question requires. The Supreme Court of Washington approved a scheme that cannot be squared with *Winship, supra.* This Court should resolve the conflict between the decision below and *Winship,* including authority on which *Winship's* holding is grounded. *Winship,* 397 U.S. at 362.

III. THE SUPREME COURT OF WASHINGTON ERRED IN HOLDING THAT AN UNPROVEN CHARGE MAY TRIGGER AN INCREASED JAIL SENTENCE.

Notwithstanding the provocative quality of recent cases concerning a defendant's right to a jury determination of sentencing factors, rationales expressed by writers for the majority or dissent in those cases have no necessary place in this discussion. As stated in *McMillan v. Pennsylvania,* 477 U.S. 79, 87, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986), the due process clause limits legislative power:

> "'[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland v. American Sugar Rfg. Co.*, 241 U.S. 79, 86 [36 S.Ct. 498, 500, 60 L.Ed. 899] (1916). The legislature cannot 'validly command that the findings of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.' *Tot v. United States*, 319 U.S. 463, 469 [63 S.Ct. 1241, 1246, 87 L.Ed. 1519] (1943)." *Patterson*, 432 U.S., at 210, 97 S.Ct., at 2327.

The statute questioned in this case goes farther than declaring the petitioner guilty or presumptively guilty; it declares her a convict without proof of any element of the "prior offense."

This case has nothing to do with: mandatory minimum vs. enhanced maximum sentences; burden of proof at sentencing; adjudicatory phase of trial vs. sentencing phase of trial; right to jury trial; or a sentencing court's discretion. Rather, this case has to do with the statutory mandate that the sentencing court treat a person convicted of first degree negligent driving as if he or she had been convicted of DUI without proof of that charge. No sentencing court could constitutionally increase a defendant's sentence based on an invalid conviction. *A fortiori*, a sentencing court may not be required to increase jail time based on a conviction fabricated by the legislature.

By approving a statutory scheme in which an unproven charge establishes a "prior offense," due process is denied. One could not be convicted of DUI based on an unproven charge. A sentencing court may not be required

to increase jail time based on the same constitutionally inconsequential factor.

The court below concluded that the *Winship, supra,* standard was met because the petitioner was duly convicted of first degree negligent driving. (App. A-8) But Ms. Greene would not have had a "prior offense" under the statute in question had she simply been convicted of negligent driving in the first degree. The increased, mandatory minimum sentence faced by Ms. Greene could be imposed only if she had been originally charged with DUI in the case that resulted in the negligent driving conviction. No proof of any element of the original DUI charge is required before the increased sentence must be imposed. Mandatory punishment on proof, not of facts, but of the mere filing of the charge denies due process. The petition should be granted so that this stark deprivation of due process may be overcome.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Washington.

Dated this 2nd day of December, 2005.

Respectfully submitted,

MICHAEL E. DE GRASSE
Counsel for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF WALLA WALLA, Petitioner, v. KATHLEEN J. GREENE, Respondent.	) No. 75108-1) En Banc) (Filed Jul. 28, 2005)

C. JOHNSON, J. – This case involves a constitutional challenge to RCW 46.61.5055(12)(a)(v), which defines "prior offenses" that increase mandatory minimum sentences for certain driving under the influence (DUI) convictions. Specifically, the constitutional challenge involves whether a "prior offense" can include a conviction for first degree negligent driving where the conviction was originally charged as DUI. Walla Walla District Court ruled that the statute violates requirements of due process. We granted direct review and reverse.

FACTS

In 2000, Kathleen Greene (Greene) was charged with DUI, to which she pleaded guilty to an amended charge of first degree negligent driving, under RCW 46.61.5249.[1] In 2004, on the current offense, Greene was charged and

[1] As part of this earlier charge, Greene stated: "I understand that my conviction for this offense . . . may be used to enhance and increase the penalty if I am subsequently convicted of any other alcohol related driving offense." Clerk's Papers (CP) at 41.

convicted of DUI.[2] Under RCW 46.61.5055, a person with a "prior offense" within the past seven years is subject to a harsher mandatory sentence.

At sentencing for the current offense, Greene argued that the statute establishing harsher minimum sentencing based on the definition of "prior offense" is unconstitutional on due process grounds. She contended that since each element of her earlier DUI-related charge was not proved to be DUI, her current charge should be considered a first time offense.

The prosecution, City of Walla Walla, contended that the due process protection as argued by Greene relates only to the adjudicatory phase of criminal proceedings, not the sentencing phase. Thus, since the statutory definition of a "prior offense" requires a conviction for certain listed offenses, a valid conviction is established for due process purposes. As a result, the prosecution contended that the statutory minimum sentence for Greene's "second offense" should have been imposed.

Walla Walla District Court agreed with Greene, relying on *State v. Shaffer,* 113 Wn.App. 812, 818-20, 55 P.3d 668 (2002), which concluded certain mandatory minimum sentencing enhancements violate due process if based on an earlier unproven "prior offense." Accordingly, the district court sentenced Greene as a DUI first time offender, resulting in two nonsuspended days in jail. The prosecution appealed, and we accepted direct review. We overrule *Shaffer,* reverse the district court, and remand.

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[2] Charged for DUI on March 23, 2002, Greene was eventually convicted on that charge in Walla Walla District Court on February 6, 2004. CP at 1-8.

STANDARD OF REVIEW

The constitutionality of a statute is a matter of law reviewed de novo. *State v. Shultz,* 138 Wn.2d 638, 643, 980 P.2d 1265 (1999).

DISCUSSION

In 1995, the legislature enacted the revisions to RCW 46.61.5055 at issue in this case. RCW 46.61.5055(12)(a)(v) provides that certain DUI-related convictions are considered "prior offenses," whether or not a DUI was the final conviction.

The statute provides a "prior offense" is:

> A conviction for a violation of RCW 46.61.5249 [negligent driving-first degree], RCW 46.61.500 [reckless driving], or RCW 9A.36.050 [reckless endangerment] or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 [driving under the influence] or RCW 46.61.504 [physical control of vehicle under the influence], or an equivalent local ordinance, or of RCW 46.61.520 [vehicular homicide] or RCW 46.61.522 [vehicular assault].

RCW 46.61.5055(12)(a)(v).

Walla Walla District Court relied on *Shaffer,* 113 Wn. App. 812. In *Shaffer,* the Court of Appeals determined that a two year mandatory statutory sentence enhancement after a vehicular homicide conviction is a violation of due process since it was based on an earlier "prior offense" of reckless driving, originally charged as DUI. The court reasoned that since the statute does not require any proof that an earlier DUI was committed, it violates due process.

Shaffer, 113 Wn. App. at 818-19. The court relied on *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), to hold that it was unconstitutional to conclude that a prior DUI offense occurred where no proof existed.

Greene contends that based on *Shaffer,* RCW 46.61.5055(12)(a)(v) is unconstitutional because an unproven DUI charge, even if resulting in a variant conviction, cannot be used to deprive a person of liberty. She claims that the due process clause of the Fourteenth Amendment[3] protects her from being imprisoned for a crime in which each element is not proved beyond a reasonable doubt. The prosecution argues that *Shaffer* should be overruled, and the statute should be considered valid, because the legislature has the authority to define any related prior conviction as a "prior offense."

In *Shaffer,* the Court of Appeals interpreted former RCW 9.94A.310(7), recodified as RCW 9.94A.510(7)(2000), by Laws of 2001, ch. 10, § 6. *Shaffer,* 113 Wn.App. at 816, 55 P.3d 668. The statute requires a two year mandatory enhancement for each prior offense as defined in RCW 46.61.5055. As in *Shaffer,* RCW 46.61.5055 is the statute at issue here which incorporates particular driving-related convictions that were originally charged as DUI. RCW 46.61.5055(12)(a)(v).

The Court of Appeals assumed and stated in its analysis that the legislature only included a prior offense "where DUI was involved." *Shaffer,* 113 Wn. App. at 818. The court cited the statutory definition under former RCW 9.94A.310(7) as follows: "'An additional two years shall be

[3] "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug . . . for each prior offense [of *driving under the influence*].'" *Shaffer,* 113 Wn. App. at 816 (emphasis added) (alteration in original). The problem with this analysis is that under the statute at issue, the definition of prior offense does not contain the emphasized language that was added by the Court of Appeals.

The statutory list of prior offenses contains more than merely a DUI conviction. RCW 46.61.5055(12)(a)(v) lists specific convictions that constitute a prior offense under the statutory definition. The statute then limits applicability to those convictions where DUI was the predicate charge, thus requiring alcohol or drugs to be involved with the convicted driving offense. No parties dispute the statute is constitutional without this limiting DUI element. It follows that with the limiting element, the legislature is simply clarifying those alcohol or drug related prior offenses to be considered. While the *Shaffer* court might be correct if the statutory definition of prior offenses listed only unproven charges, here, the statute specifies the prior convictions being applied to impose an enhanced punishment for a later offense. Subject only to the constraints of the constitution, the legislature may define and punish criminal conduct. *In re Pers. Restraint of Davis,* 142 Wn.2d 165, 172, 12 P.3d 603 (2000).

The statutory definition requires a conviction for negligent driving, or other listed offense, originating from a DUI charge. RCW 46.61.5055(12)(a)(v). Accordingly, the statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs.

Thus, due process is satisfied for the purposes of this mandatory enhancement if the prior conviction[4] exists and the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense.

The court in *Shaffer* erred in concluding that the due process protections articulated in *Winship* render RCW 46.61.5055(12)(a)(v) unconstitutional. *Winship* held that every element of a crime must be proved beyond a reasonable doubt in the context of a criminal proceeding. *Winship*, 397 U.S. at 364. For Greene, the fact that she was convicted of first degree negligent driving is sufficient to satisfy her due process protections because all elements of that offense are established by virtue of the conviction itself. Accordingly, we hold that here, RCW 46.61.5055(12)(a)(v) survives constitutional challenge.

CONCLUSION

¶ 16 We reverse the district court, overrule *Shaffer*, and remand for disposition consistent with this opinion.

/s/ C Johnson J

[4] Negligent driving in the first degree (46.61.5249), reckless driving (46.61.500), or reckless endangerment (9A.36.050). RCW 46.61.5055(12)(a)(v).

We Concur:

/s/ Alexander, C.J.

/s/ Madsen, J.

/s/ Owens, J.

/s/ Fairhurst, J.

/s/ Bridge, J.

/s/ J M Johnson, J

No. 75108-1

SANDERS, J. (dissenting)

Five years ago Kathleen Greene was charged with driving under the influence (DUI) and pleaded guilty to the lesser offense of first degree negligent driving. Last year she was charged and convicted of DUI. Under RCW 46.61.5055 the State seeks to use Greene's previous plea as a "prior conviction" for a sentence enhancement even though she was not convicted of DUI. While such action may be allowed under the statute, it deprives Greene of her liberty absent the process due her under the constitution by increasing her punishment based on an unproven DUI charge. Nevertheless, the majority upholds the statute. I dissent.

The trial court struck down the statute, relying on *State v. Shaffer,* 113 Wn. App. 812, 55 P.3d 668 (2002). In *Shaffer,* the defendant pleaded guilty to a charge of vehicular homicide and received a mandatory sentencing enhancement of 24 months because he had previously been charged with DUI, even though the previous conviction was for reckless driving. The Court of Appeals struck down

the statute (former RCW 46.61. 5055(11)(a)(v) (1999))[1] as unconstitutional since it increased the defendant's punishment based on an unproven DUI charge. The court reasoned a sentence could not be enhanced under the statute for mere reckless driving or first degree negligent driving. An additional requirement is needed to trigger the mandatory enhancement: the unproved DUI charge. Such a mandatory enhancement violated due process because the State is never required to prove DUI; it never has to prove alcohol was even involved in the previous conviction. *See Shaffer,* 113 Wn.App. at 818 n. 19 (describing situations where a DUI could be charged but not proved).

Further, the court reasoned the statute fell short of the "minimum constitutional standard required for criminal conviction. That standard is for proof beyond a reasonable doubt." *Id.* at 819; *see also In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (holding that due process requires the government to prove every element of a crime beyond a reasonable doubt). If a defendant pleads guilty to reckless driving or first degree negligent driving and later to an unrelated DUI, he is not liable for the mandatory enhancement. If, however, the

---

[1] The relevant language of the former version is identical to the present version, which includes this provision in the definition of a "prior offense":

> A conviction for a violation of RCW 46.61.5249 [first degree negligent driving], 46.61.500 [reckless driving], or 9A.36.050 [reckless endangerment] or an equivalent local ordinance, if the conviction is the result of a charge that was *originally filed* as a violation of RCW 46.61.502 [DUI] or 46.61.504 [physical control of a vehicle under the influence], or an equivalent local ordinance, or of RCW 46.61.520 [vehicular homicide] or 46.61.522 [vehicular assault].

RCW 46.61.5055(12)(a)(v) (emphasis added).

first crime was charged as DUI, then he is so liable. A difference in punishment is predicated on an unproved charge. This result violates due process.

Shaffer is persuasive, but the majority disapproves of its reasoning. The majority concludes the State is required to demonstrate the first conviction was alcohol related. Majority at 8. This is so, the majority reasons, because the statute requires a DUI charge. *Id.* But that is the problem. The first conviction could have been charged as DUI even if the charge was inaccurate and could not be proved. *See Shaffer,* 113 Wn. App. at 818 n.19. The result is a mandatory sentence enhancement based on a conviction that may not have involved alcohol. Due process requires greater safeguards to protect individual liberty.

I would affirm the district court and therefore dissent.

/s/ Sanders, J.
/s/ Chambers, J.

DISTRICT COURT OF
WALLA WALLA COUNTY, WASHINGTON

CITY OF WALLA WALLA, Plaintiff, vs. Kathleen J. Greene, Defendant.	No. C312984 TRIAL COURT STATEMENT SETTING FORTH REASONS FOR DIRECT REVIEW (RAP 4.3(a)) (Filed Feb. 06, 2004)

The Walla Walla District Court herein sets forth the following reasons for concluding that the Washington Supreme Court should grant direct review of the trial court decision in the above-court case:

1.1 This case involves a fundamental and urgent issue of statewide importance requiring prompt and precedential determination (RAP 4.3(a)(2)(a)), because at issue is the constitutionality of RCW 46.61.5055(12)(a)(v) as applied to Washington's driving under the influence (DUI) sentencing statute. RCW 46.61.5055(12)(a)(v) provides in pertinent part that that "[a] conviction for a violation of RCW 46.61.5249 [first degree negligent driving] . . . or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 [driving under the influence] . . . " constitutes a "prior offense" for the purpose of determining the applicable mandatory minimum sentence under RCW 46.61.5055(1)-(3) in DUI cases. Between 1998-2002, 37,775 DUI cases were amended to first degree negligent driving:

Year	DUI cases amended to 1st degree negligent driving which resulted in conviction or bail forfeiture
1998	7,319
1999	7,771
2000	7,565
2001	7,086
2002	8,034
total	37,775

The recidivism rate in cases involving a DUI arrest is 30%. Therefore, over 11,000 future DUI cases involving defendants convicted of first degree negligent driving between 1998 and 2002, in addition to unenumerated cases from other periods, are potentially affected by the determination of whether or not RCW 46.61.5055(12)(a)(v) is constitutionally enforceable.

1.2 Delay in obtaining a determination from the Washington Supreme Court regarding the constitutionality of RCW 46.61.5055(12)(a)(v) as applied to Washington's driving under the influence (DUI) sentencing statute, RCW 46.61.5055(1)-(3), would cause significant detriment to the public interest (RAP 4.3(a)(2)(b)), because trial courts are compelled not to apply the statute until the Washington Supreme Court determines the issue. In *State v. Shaffer*, 113 Wn.App. 812, 55 P.3d 668 (2002), the Washington Court of Appeals held that former RCW 46.61.5055(11)(a)(v) (current RCW 46.61.5055(12)(a)(v)) violated the Due Process Clause of U.S. Const. Amend. 14, § 1 when applied to impose a two year enhancement in vehicular homicide cases pursuant to former RCW 9.94A.310(7) (current RCW 9.94A.510(7)). Neither party in *Shaffer* sought review before the Washington Supreme Court. Trial courts feel compelled to apply *Shaffer* in DUI

sentencing cases until the Washington Supreme Court determines the issue, consequently, current DUI cases, and future DUI cases, in which sentence is imposed during such interim period are impacted if they involve a defendant previously convicted of 1st degree negligent driving. The exact number of cases involving defendants previously convicted of 1st degree negligent driving is unknown, however, between 1998-2002, there were 74,884 DUI cases sentenced in Washington:

Year	DUI cases
1998	15,089
1999	15,668
2000	15,001
2001	13,918
2002	15,208
total	74,884

Therefore, a significant number of cases currently being sentenced in Courts of Limited Jurisdiction are likely impacted and future cases will continue to be impacted until this issue is determined by the Washington Supreme Court.

1.3 The record of the proceedings in the Walla Walla District Court adequately present the issue (RAP 4.3(a)(2)(c)), for the following reasons:

A. A complete written factual record has been established for the issue presented for review. The defendant in this case was previously arrested on November 13, 2000, and charged with the crime of driving while under the influence of intoxicating liquor or any drug under section 46.61.502. That original charge of driving while under the influence was amended to first degree negligent

driving and the defendant was convicted of the amended charge on January 23, 2001. The defendant was subsequently arrested and charged in the above-entitled case with a DUI under RCW 46.61.502 on March 23, 2002. The defendant entered a guilty plea to that charge on February 6, 2003. A factual record was made and findings and conclusions were entered.

B. A written record was made containing the legislative history for RCW 46.61.5055(12)(a)(v) (RCW 46.61.5055(8)(a)(v) when enacted) and RCW 46.61.513.

C. The issue in this case was comprehensively briefed by the parties, and a clear written record was made of the basis for decision by the trial court. Findings, conclusions, and written orders were entered.

D. The issue regarding the constitutionality of RCW 46.61.5055(12)(a)(v) has been isolated to be presented as a single issue for review.

DATED: February 6, 2004

/s/ John O. Knowlton
HON. JOHN KNOWLTON
Walla Walla District
Court Judge

DISTRICT COURT OF
WALLA WALLA COUNTY, WASHINGTON

CITY OF WALLA WALLA, Plaintiff, vs. Kathleen J. Greene, Defendant.	No. C312984 SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFENDANT'S CRIMINAL HISTORY AND DRIVING RECORD (RCW 46.61.513)

I. FINDINGS OF FACT

The court finds, based upon a preponderance of the evidence, that:

1.1 Kathleen J. Greene, Washington driver's license number GREENKJ480PA, was arrested on November 13, 2000, and charged in Walla Walla District Court case number C311278 with the crime of driving while under the influence of intoxicating liquor or any drug under section 46.61.502 of the Revised Code of Washington which is incorporated through the Washington Model Traffic Ordinance, Chapter 308-330 of the Washington Administrative Code, by section 10.03.010 of the Walla Walla Municipal Code.

1.2 The original charge of driving while under the influence of intoxicating liquor or any drug under section 46.61.502 of the Revised Code of Washington was amended to first degree negligent driving under section 46.61.5249 of the Revised Code of Washington which is incorporated through the Washington Model Traffic Ordinance, Chapter 308-330 of the Washington Administrative Code, by section 10.03.010 of the Walla Walla Municipal Code, and Kathleen J. Greene was convicted of the amended charge

of first degree negligent driving in Walla Walla District Court case number C311278 on January 23, 2001.

II. CONCLUSIONS OF LAW

For purposes of imposition of mandatory minimum sentencing under RCW 46.61.5055, the court concludes that:

2.1 Kathleen J. Greene's conviction for 1st degree negligent driving in Walla Walla District Court case number C311278 on January 23, 2001 constitutes a "prior offense" as defined by RCW 46.61.5055(12)(a)(v). With the exception of Walla Walla District Court case number C311278, Kathleen J. Greene has not previously been convicted of any other "prior offense" within seven years as defined by RCW 46.61.5055(12).

2.2 This court is bound by State v. Shaffer, 113 Wn. App. 812 (2002), and compelled to conclude in accordance with that decision that RCW 46.61.5055(12)(a)(v)

☑ does

☐ does not

violate the due process clause of U.S. Const. Amend. 14.

2.3 On the basis of this court's conclusion in paragraph 2.2 herein regarding the constitutionality of RCW 46.61.5055(12)(a)(v), the applicable mandatory minimum sentencing for Kathleen J. Greene's conviction of driving while under the influence of intoxicating liquor or any drug in the above-entitled case, Walla Walla District Court case number C312984, is provided in:

☑ RCW 46.61.5055(1)(b) (first offense sentencing)

☐ RCW 46.61.5055(2)(b) (second offense sentencing)

DATED: February 6, 2004

/s/ John O. Knowlton
HON. JOHN KNOWLTON
Walla Walla District
Court Judge

THE SUPREME COURT OF WASHINGTON

CITY OF WALLA WALLA, Petitioner, v. KATHLEEN GREENE, Respondent.	NO. 75108-1 **ORDER DENYING MOTION FOR RECONSIDERATION** (Filed Sep. 9, 2005)

The Court having considered the Respondent's Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 9th day of September 2005.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

154 Wn.2d 722

DISTRICT COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

CITY OF WALLA WALLA, Plaintiff, vs. KATHLEEN GREENE, Defendant.	No. C312984 DECLARATION RE: STATEWIDE IMPORTANCE OF ISSUES RE: CONSTITUTIONALITY OF RCW 46.61.5055(12)(a)(v)

I am at least twenty-one years of age, competent to make this declaration, and make it upon my personal knowledge and my knowledge of the reports and official records referenced herein:

1. The recidivism rate for drivers arrested for driving under the influence of an intoxicating liquor or drug is approximately 30%:

A. Attached hereto as exhibit 1 is a genuine copy of "Drivers with Repeat Convictions or Arrests for Driving While Impaired – United States," Morbidity and Mortality Weekly Report (MMWR), volume 43, number 41, at pages 759-761 (Centers for Disease Control and Prevention, October 21, 1994). This study estimates from available data that 31.8% of drivers convicted of driving while intoxicated were previously convicted of driving while intoxicated. This study also estimates from available data that 30.9% of drivers arrested for driving while intoxicated were previously arrested for driving while intoxicated.

B. Attached hereto as exhibit 2 is a genuine copy of "Repeat DWI Offenders in the United States," Traffic Tech, Number 85 (National Highway Traffic Safety Administration, February 1995). This study estimates from available

data that 31.5% of drivers convicted of driving while intoxicated were previously convicted of driving while intoxicated. This study also estimates from available data that 34.2% of drivers arrested for driving while intoxicated were previously arrested for driving while intoxicated.

C. I directed my office to review every case handled by the Walla Walla City Attorney's Office in 2002 and 2003 to determine how many cases involved a driver who had been previously charged with an alcohol related driving offense. My office reviewed the criminal history for each case charged during that period.

(1) In 2002, 257 cases were charged through the Office of the Walla Walla City Attorney which involved either a driving under the influence charge or actual physical control while under the influence charge. Of those 257, 76 (29.5%) involved drivers who had previously been charged with an alcohol related driving offense.

(2) In 2003, 221 cases were charged through the Office of the Walla Walla City Attorney which involved either a driving under the influence charge or actual physical control while under the influence charge. Of those 221, 66 (29.8%) involved drivers who had previously been charged with an alcohol related driving offense.

2. Annual Caseload Report for Courts of Limited Jurisdiction regarding Disposition and Sentencing of DUI cases indicate that 37,775 cases were amended from DUI or physical control case to 1st degree negligent driving and resulted in a conviction or bail forfeiture between 1998-2002.

A. Attached hereto as exhibit 3 are sections of the 1998 Annual Caseload Report for Courts of Limited

Jurisdiction regarding Disposition and Sentencing of DUI cases. This report indicates that there were 7,319 cases for 1998 in Washington in which a DUI or physical control charge was amended to 1st degree negligent driving and resulted in a conviction or bail forfeiture.

B. Attached hereto as exhibit 4 are sections of the 1999 Annual Caseload Report for Courts of Limited Jurisdiction regarding Disposition and Sentencing of DUI cases. This report indicates that there were 7,771 cases for 1999 in Washington in which a DUI or physical control charge was amended to 1st degree negligent driving and resulted in a conviction or bail forfeiture.

C. Attached hereto as exhibit 5 are sections of the 2000 Annual Caseload Report for Courts of Limited Jurisdiction regarding Disposition and Sentencing of DUI cases. This report indicates that there were 7,565 cases for 2000 in Washington in which a DUI or physical control charge was amended to 1st degree negligent driving and resulted in a conviction or bail forfeiture.

D. Attached hereto as exhibit 6 are sections of the 2001 Annual Caseload Report for Courts of Limited Jurisdiction regarding Disposition and Sentencing of DUI cases. This report indicates that there were 7,086 cases for 2001 in Washington in which a DUI or physical control charge was amended to 1st degree negligent driving and resulted in a conviction or bail forfeiture.

E. Attached hereto as exhibit 7 are sections of the 2002 Annual Caseload Report for Courts of Limited Jurisdiction regarding Disposition and Sentencing of DUI cases. This report indicates that there were 8,034 cases for 2002 in Washington in which a DUI or physical control

charge was amended to 1st degree negligent driving and resulted in a conviction or bail forfeiture.

3. Applying a 30% recidivism rate, approximately 11,332 of the offenders whose DUI or physical control charge was amended to 1st degree negligent driving between 1998-2002 will commit another DUI offense.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1/29/2004, 2004 Walla Walla, WA. /s/ Tim Donaldson
(Date and Place) (Signature)

No. 05-758

In The
Supreme Court of the United States

KATHLEEN GREENE,

Petitioner,

v.

CITY OF WALLA WALLA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Respondent's Concise Statement of the Case 1

Arguments for denying the Petition 3

Conclusion 14

Appendix.....App. 1

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. U.S., 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) 3

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 13

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) 13

City of Walla Walla v. Greene, 154 Wash.2d 722, 116 P.3d 1008 (2005) 2, 5, 8, 13

Dretke v. Haley, 541 U.S. 386, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004) 9

Harris v. U.S., 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) 12

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 8, 9, 13

McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) ..... *passim*

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) 5

Nichols v. U.S., 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994) 7, 8

State v. Shaffer, 113 Wash. App. 812, 55 P.3d 668 (2002) 2, 4, 5

United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) 13

TABLE OF AUTHORITIES – Continued

Page

Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) 6, 7, 8, 13

Witte v. U.S., 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) 11

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment VI 13

United States Constitution Amendment XIV 2

STATUTES

Revised Code of Washington § 9.92.020 10

Revised Code of Washington § 9A.20.021 10

Revised Code of Washington § 46.61.502 ..... 3, 10

Revised Code of Washington § 46.61.5055 ..... *passim*

Revised Code of Washington § 46.61.513 1

Revised Code of Washington § 46.61.5249 ..... 1, 3

RESPONDENT'S CONCISE STATEMENT OF THE CASE

Petitioner Kathleen Greene was arrested on March 23, 2002 and charged in the proceedings below in Walla Walla District Court case number C312984 with driving under the influence of intoxicating liquor (DUI) which is prohibited by Revised Code of Washington § 46.61.502. Ms. Greene was convicted of DUI in this case on February 6, 2004.

Before sentencing, Ms. Greene's driving record and criminal history were verified to the District Court pursuant to Revised Code of Washington § 46.61.513, and the court entered findings. *See*, Appendix pages A-14 through A-16 to the Petition for Writ of Certiorari. The District Court found that Ms. Greene had previously been convicted of first degree negligent driving under Revised Code of Washington § 46.61.5249 on January 23, 2001. Appendix pages A-14 through A-15 to the Petition for Writ of Certiorari, ¶ 1.2. The District Court further found that Ms. Greene's conviction for first degree negligent driving originated from a November 13, 2000 DUI charge filed in Walla Walla District Court case number C311278. Appendix pages A-14 through A-15 to the Petition for Writ of Certiorari, ¶¶ 1.1-1.2. The District Court concluded that Ms. Greene's conviction for first degree negligent driving constitutes a "prior offense" under Washington's DUI sentencing law, Revised Code of Washington § 46.61.5055(12)(a)(v). Appendix page A-15 to the Petition for Writ of Certiorari, ¶ 2.1. These findings and conclusions regarding Ms. Greene's driving record and criminal history were not challenged in the District Court or on appeal. (To the extent required by U.S. Supreme Court Rule 15(2), respondent objects to petitioner's failure to set out in her

petition these facts relating to what occurred in the proceedings below.)

Relying upon *State v. Shaffer*, 113 Wash. App. 812, 55 P.3d 668 (2002), the District Court held that Revised Code of Washington § 46.61.5055(12)(a)(v) violated the Due Process clause of U.S. Const. Amend. 14, § 1 and could not be applied. Appendix page A-15 to the Petition for Writ of Certiorari, ¶ 2.2. On that basis, the trial court treated Ms. Greene as a first time offender under Revised Code of Washington § 46.61.5055(1)(b) rather than a second time offender under Revised Code of Washington § 46.61.5055(2)(b) despite her prior conviction for first degree negligent driving. Appendix pages A-15 through A-16 to the Petition for Writ of Certiorari, ¶ 2.3.

The Washington State Supreme Court granted direct review of the District Court's decision that Revised Code of Washington § 46.61.5055(12)(a)(v) was unconstitutional. The Washington State Supreme Court reversed the District Court and overruled *State v. Shaffer*, 113 Wash. App. 812, 55 P.3d 668 (2002). The State Supreme Court construed the statute in question, held that such construction of Revised Code of Washington § 46.61.5055(12)(a)(v) does not violate Due Process, and remanded for disposition in accordance with its decision. *City of Walla Walla v. Greene*, 154 Wash.2d 722, 116 P.3d 1008 (2005) (Appendix pages A-1 through A-9 to the Petition for Writ of Certiorari).

ARGUMENTS FOR DENYING THE PETITION

Petitioner asks this Court to misconstrue Washington's DUI sentencing law to manufacture a conflict with the decisions of this Court which does not exist, or, alternatively to create an allegedly novel issue which has already been decided. Petitioner argues that "[t]he statute in question requires the sentencing judge to treat the defendant as having been convicted of a charge that was merely filed, but never proven." Petition for Writ of Certiorari, page 8. Such representation misstates the proper construction of Revised Code of Washington § 46.61.5055(12)(a)(v), and respondent objects to such misstatement pursuant to U.S. Supreme Court Rule 15(2).

Revised Code of Washington § 46.61.5055(12)(a)(v) is triggered by a conviction. It states:

> (a) A "prior offense" means any of the following:
>
> . . .
>
> (v) A *conviction* for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;

(Emphasis added). As this Court noted in *Almendarez-Torres v. U.S.*, 523 U.S. 224, 230, 118 S.Ct. 1219, 1224, 140 L.Ed.2d 350 (1998): "the relevant statutory subject matter is recidivism. That subject matter – prior commission of a serious crime – is as typical a sentencing factor as one might imagine."

The Washington Supreme Court rejected Petitioner Greene's construction of the statute and noted that it

attempts to read language into the statute which is not there:

> Greene contends that based on *Shaffer,* RCW 46.61.5055(12)(a)(v) is unconstitutional because an unproven DUI charge, even if resulting in a variant conviction, cannot be used to deprive a person of liberty. She claims that the due process clause of the Fourteenth Amendment protects her from being imprisoned for a crime in which each element is not proved beyond a reasonable doubt. The prosecution argues that *Shaffer* should be overruled, and the statute should be considered valid, because the legislature has the authority to define any related prior conviction as a "prior offense."
>
> In *Shaffer,* the Court of Appeals interpreted former RCW 9.94A.310(7), recodified as RCW 9.94A.510(7)(2000), by Laws of 2001, ch. 10, § 6. *Shaffer,* 113 Wash.App. at 816, 55 P.3d 668. The statute requires a two year mandatory enhancement for each prior offense as defined in RCW 46.61.5055. As in *Shaffer,* RCW 46.61.5055 is the statute at issue here which incorporates particular driving-related convictions that were originally charged as DUI. RCW 46.61.5055(12)(a)(v).
>
> The Court of Appeals assumed and stated in its analysis that the legislature only included a prior offense "where DUI was involved." *Shaffer,* 113 Wash.App. at 818, 55 P.3d 668. The court cited the statutory definition under former RCW 9.94A.310(7) as follows: "'An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug . . . for each prior offense [of *driving under the influence*].'" *Shaffer,* 113 Wash.App. at 816,

> 55 P.3d 668 (emphasis added) (alteration in original). The problem with this analysis is that under the statute at issue, the definition of prior offense does not contain the emphasized language that was added by the Court of Appeals.
>
> The statutory list of prior offenses contains more than merely a DUI conviction. RCW 46.61.5055(12)(a)(v) lists specific convictions that constitute a prior offense under the statutory definition. The statute then limits applicability to those convictions where DUI was the predicate charge, thus requiring alcohol or drugs to be involved with the convicted driving offense. No parties dispute the statute is constitutional without this limiting DUI element. It follows that with the limiting element, the legislature is simply clarifying those alcohol or drug-related prior offenses to be considered. While the *Shaffer* court might be correct if the statutory definition of prior offenses listed only unproven charges, here, the statute specifies the prior convictions being applied to impose an enhanced punishment for a later offense.

City of Walla Walla v. Greene, 154 Wash.2d 722, 726-727, 116 P.3d 1008, 1010-1011 (2005) (Appendix pages A-4 through A-5 to the Petition for Writ of Certiorari). The U.S. Supreme Court has repeatedly held that state courts are the ultimate expositors of state law, and that it is bound by their constructions except in extreme circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 886, 44 L.Ed.2d 508 (1975).

Revised Code of Washington § 46.61.5055(12)(a)(v) requires a sentencing judge to consider first degree negligent driving convictions for purposes of mandatory minimum sentencing. It utilizes information underlying a prior

charge only as a limitation upon whether or not such conviction qualifies for consideration.

This Court has long recognized that Due Process permits a sentencing court to consider the type of information used as a limiting element by Revised Code of Washington § 46.61.5055(12)(a)(v). In *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), the Supreme Court rejected the defendant's contention that the judge was prohibited from considering information about a number of uncharged criminal activities revealed in the pre-sentence report:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders.

Williams, 337 U.S. at 246, 69 S.Ct. at 1082. The Court went on to hold that Due Process did not preclude the use of information regarding uncharged conduct in determining a defendant's sentence.

> In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to

> the information received in open court. The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts – state and federal – from making progressive efforts to improve the administration of criminal justice.

Williams, 337 U.S. at 251, 69 S.Ct. at 1085. The *Williams* analysis is not confined to discretionary sentencing. In *Nichols v. U.S.*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), this Court held that Due Process permitted a prior un-counseled misdemeanor DUI conviction to be used to increase a defendant's sentence, writing:

> As a general proposition, a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker,* 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant." *Wisconsin v. Mitchell,* 508 U.S. 476, 485, 113 S.Ct. 2194, 2199, 124 L.Ed.2d 436 (1993). One such important factor, as recognized by state recidivism statutes and the criminal history component of the Sentencing Guidelines, is a defendant's prior convictions. Sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior. We have upheld the constitutionality of considering such previous conduct in *Williams v. New York,* 337

> U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). We have also upheld the consideration of such conduct, in connection with the offense presently charged, in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). There we held that the state could consider, as a sentence enhancement factor, visible possession of a firearm during the felonies of which defendant was found guilty.
>
> Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence. *Id.*, at 91, 106 S.Ct., at 2418-2419. Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proved beyond a reasonable doubt.

Nichols, 511 U.S. at 747-748, 114 S.Ct. at 1927-1928. In *Williams*, *Nichols*, and progeny, this court has consistently held that a defendant's past criminal behavior may be used to enhance a sentence within a maximum statutory penalty, even if no conviction resulted from that behavior. In the present case, there actually exists an unchallenged prior conviction, and underlying information is utilized only as a potential limitation upon use of that traditional enhancement factor. *Greene*, 154 Wash.2d at 726-727, 116 P.3d at 1010-1011.

The Washington Supreme Court's decision in *Greene* does not transgress *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In that case, Samuel Winship